



MATTHEW E. JENSEN
mjensen@smithlawonline.com

July 5, 2011

--Via Hand Delivery--

Kent L. Jones, P.E.
State Engineer
UTAH DIVISION OF WATER RIGHTS
1594 West North Temple, Suite 220
P.O. Box 146300
Salt Lake City, UT 84114-6300

**Re: REQUEST FOR RECONSIDERATION
Summit Creek Distribution Order of the State Engineer**

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Dear Mr. Jones,

Smithfield Irrigation Company ("**Smithfield Irrigation**"), by and through its undersigned counsel, hereby submits this Request for Reconsideration on the June 14, 2011 Summit Creek Distribution Order of the State Engineer ("**Distribution Order**"). This Request for Reconsideration is authorized by Utah Code Ann. § 63G-4-302 and is timely filed on or before July 5, 2011.

Smithfield Irrigation Company

Smithfield Irrigation provides secondary water to many residents of Smithfield City and irrigation water to farmers in the Smithfield area. Smithfield Irrigation is the owner of Water Right No. 25-6109 and associated change applications, under which Smithfield Irrigation is entitled to divert 33.5 cfs from Summit Creek. This water right has a priority of 1860, which is prior to any other water right on Summit Creek. Because the flow of Summit Creek generally falls below 33.5 cfs during the summer months, Smithfield Irrigation is usually the only water right owner that is permitted to divert from Summit Creek during much of the irrigation season. This water right is Smithfield Irrigation's primary water right used to supply water to shareholders; accordingly, Smithfield Irrigation has a strong interest in protecting the water in Summit Creek. Smithfield Irrigation is active in the Summit Creek Distribution System and Committee.

Hyde Park City Exchange

In 1979, Hyde Park City ("**Hyde Park**") filed Exchange Application No. 1428, Water Right No. 25-9351 ("**Exchange**"), under which Hyde Park sought to divert 1.0 cfs from springs tributary to Birch Creek, which is tributary to Summit Creek. In exchange, Hyde Park proposed to deliver 1.0 cfs of water through the Logan, Hyde Park and Smithfield Canal into Summit Creek. The Exchange was protested by Smithfield Irrigation and other water users.

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In a Memorandum Decision dated January 14, 1980, the State Engineer approved the Exchange. (A copy of the Memorandum Decision is attached as **Exhibit A.**) Condition 4 of the Memorandum Decision was that "[t]he overflow from Hyde Park's new reservoir, if any, will be discharged into the Logan, Hyde Park and Smithfield Canal to flow on through the exchange point and into Summit Creek so that the extra water diverted will not be lost to that hydrologic system."

In March 1980, Smithfield Irrigation appealed the Memorandum Decision by filing a Complaint in the district court. Thereafter, the parties engaged in negotiations to resolve the matter. The case was settled pursuant to a settlement agreement dated November 24, 1981 ("**Agreement**"). (A copy of the Agreement is attached as **Exhibit B.**) The Agreement permitted Hyde Park to take the 1.0 cfs from the Birch Creek springs, but also contained some negotiated conditions to protect Smithfield Irrigation and its shareholders. Paragraph 5 of the Agreement provides:

Whenever Hyde Park City is not using the 1.0 cfs of water from Birch Creek, (meaning the Hyde Park City reservoir is overflowing), all water overflowing from the upper Hyde Park City reservoir shall be diverted toward the Logan, Hyde Park and Smithfield Canal as part of the exchange, even if the overflow water is in excess of the amount of water in this exchange (1.0 cfs), and shall be delivered from the canal and by the Canal Company to the Smithfield Irrigation Company and its members and shareholders.

The Agreement was signed by Smithfield Irrigation and Hyde Park, and was approved by the State Engineer. Pursuant to the Agreement, the court case was dismissed. (A copy of the Order of Dismissal is attached as **Exhibit C.**) The State Engineer's Office acknowledged that it was bound by the terms of the Agreement. (See Memorandum attached as **Exhibit D.**)

Distribution Order

In 2010, the Northern Regional Office determined that changed circumstances necessitated a revised distribution order for Summit Creek. Primary among these changed circumstances was the failure of the Logan and Northern Canal in the summer of 2009. Near the end of 2010, the Northern Regional Office circulated a draft of the revised distribution order to members of the Summit Creek Distribution System. Smithfield Irrigation submitted comments to the Northern Regional Office regarding the draft distribution order. At the Summit Creek Distribution System meeting in January 2011, the Northern Regional Office distributed a second draft of the distribution order.

On June 14, 2011, the Distribution Order was issued. The Distribution Order differed greatly from the earlier drafts that members of the Summit Creek Distribution System had reviewed and commented on, including the addition of five conditions. Condition 3 provides:

"This Order rescinds condition 4 of the Memorandum Decision on Exchange number 1428 filed by Hyde Park City dated January 14, 1980, regarding the overflow from Hyde Park's reservoir. Hyde Park may return its overflow into Birch Creek and be credited for a deduction if it is measured."


Smithfield Irrigation feels that the Distribution Order generally does a good job of providing guidance to the Distribution System members and Creek Commissioner. But Condition 3 is improper and should be removed from the Distribution Order. The State Engineer has no authority to override and eliminate an essential term of a settlement agreement, especially via a distribution order. The State Engineer was a signatory to the Agreement, and neither State Engineer nor Hyde Park can unilaterally modify the terms of the Agreement without the consent of Smithfield Irrigation. *See, e.g., Richard Barton Enters. v. Tsern*, 928 P.2d 368, 373 (Utah 1996) (holding that a modification of an agreement requires a meeting of the minds of the parties); *see also* 17A Am Jur 2d Contracts § 507 (stating that an existing contract can be modified only by mutual assent). Smithfield Irrigation agreed to dismiss its lawsuit based on the Agreement and the parties' promise to abide by its terms. Condition 3 strips Smithfield Irrigation of its bargained-for rights under the Agreement by removing a key term of the Agreement. If circumstances have changed with respect to Hyde Park's water system, as alleged by the State Engineer, then the State Engineer and/or Hyde Park can approach Smithfield Irrigation about negotiating new terms. The State Engineer cannot, however, make a unilateral, material change to the Agreement.

Conclusion

For the reasons discussed herein, Smithfield Irrigation respectfully requests that this Request for Reconsideration be granted and that the Distribution Order be amended to delete Condition 3.

If further information would be helpful, please do not hesitate to contact me.

Respectfully submitted this 5th day of July, 2011.


Matthew E. Jensen
SMITH HARTVIGSEN, PLLC
Attorney for Smithfield Irrigation Company

Cc: Jeff Gittins, President, Smithfield Irrigation Company
Bruce Jorgensen, Hyde Park City Attorney

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BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF EXCHANGE)

APPLICATION NUMBER 1428 (25 Area))

MEMORANDUM DECISION

Exchange Application Number 1428 (25 Area) filed by Hyde Park City, Hyde Park, Utah seeks the right to exchange a maximum of one (1) cfs of water obtained from shares in the Logan Northfield Irrigation Company evidenced in the Kimball Decree Awards #222 abcd. The applicant proposes to transport one (1) cfs of water from April 1 to October 31 each year in the Logan Hyde Park Smithfield Canal and inject it into Summit Creek at a point South 670 feet and East 500 feet from the Northwest Corner, Section 26, T13N, R1E, SLB&M. In exchange for the water delivered above, the applicant will divert one (1) cfs from April 1 to October 31 from the Hyde Park Springs at a point South 1500 feet and East 2100 feet from the Northwest Corner, Section 22, T13N, R2E, SLB&M; to be used within the corporate limits of Hyde Park City. The application was advertised in the Herald Journal beginning May 3, 1979 and ending May 17, 1979 and subsequently was protested by the Smithfield North Bench Irrigation Company, Don Meikle, James L. Shupe, Doris R. Roskelley, Robert O. Cronquist, Smithfield Irrigation Company, Cache Valley Chinchilla Corporation and later by Smithfield City.

A hearing was held in Logan, Utah on August 16, 1979. Counsel for the applicant stated they had acquired 55 shares in the Logan Northfield Irrigation Company and supplied an affidavit signed by the president of the Logan Hyde Park and Smithfield Canal saying that they would transport Hyde Park's shares to the injection point in Summit Creek. He also stated that they had two agreements dated 1912 and 1935 which allow them presently to divert 0.5 cfs of water from Hyde Park Springs. They are seeking an additional one (1) cfs to supply municipal expansion, and they had already contracted to build more storage and to upgrade the distribution system.

Thad Erickson for Cache Valley Chinchilla Corporation stated that Summit Creek is fully appropriated through the winter, and that one (1) cfs diversion would interfere with their fish culture rights on Summit Creek. Dale Nielson for the Smithfield Irrigation Company stated that the upper canal (Logan, Hyde Park and Smithfield Canal) could not carry the water. They were decreed 120 cfs but could only divert between 75 cfs and 85 cfs because of capacity constraints. He also stated that he did not believe that one (1) cfs would satisfy Hyde Park's municipal expansion problems and that they may as well drill a well now. Cleon Chambers, LeGrande Shupe and Don Meikle stated that they have high water rights on Birch Creek, to which the Hyde Park Springs are tributary, and that a one (1) cfs diversion would be that much less water that would be available to supply their rights. Robert Cronquist and LeGrande Shupe stated that they have stockwatering rights on Birch Creek between the Hyde Park Springs and the point of injection of the exchange water. Birch Creek dries up at times

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during the year, and a one (1) cfs diversion would make it dry up that much sooner. Don Meikle and Art Peterson for the Smithfield North Bench Irrigation Company stated that they have filed a water savings application to seal Birch Creek and to appropriate the saved water from Summit Creek by exchange. They believed the sealing had been successful; however, they had not measured the water to sufficiently prove how much they had saved. Smithfield City did not appear at the hearing, but submitted a written protest on August 27, 1979. They stated that they are a large shareholder in the Logan, Hyde Park and Smithfield Canal and that they do not believe an additional one (1) cfs would ever reach Summit Creek. Also, they stated that they are expecting additional housing growth on the southeast bench, and the water in Birch Creek would be ideal to supply water to this area.

The State Engineer is aware of the seepage problems on Birch Creek and is also aware of the late dated priority rights on Birch Creek between the Hyde Park Springs and the point of injection. In searching eight years of records to see when the late dated priority rights would be cut off, he finds that it would occur between June 10th and July 15th, but usually during the third or fourth week of June. He believes that those ditches should be cut off because of late-dated priorities and not because of lack of supply in Birch Creek. The one (1) cfs of diversion by Hyde Park should make no difference to the high water right users on Birch Creek.

The State Engineer believes that it should not matter whether the upper canal (Logan, Hyde Park and Smithfield Canal) can transport all of its decreed rights from Logan River, but rather whether it can deliver the additional one (1) cfs to the end of the canal. To determine this, the State Engineer measured and rated a flume at the delivery point and installed a recorder to gain a continuous record of the water delivered at the exchange point under existing exchanges. At no time during the measured period was there insufficient water to supply all existing exchanges plus the one (1) cfs sought in this exchange application.

The State Engineer believes that this exchange will not interfere with the right of Thad Erickson, dba, Cache Valley Chinchilla Corporation, since it seeks only to exchange water during the summer. Hyde Park has separate applications to appropriate water from the Hyde Park Springs during the winter months, prior to the applications of the fish farm. The State Engineer does not believe that the exchange will hinder the efforts of the Smithfield North Bench Company, since the sealed and treated area is below the Hyde Park Springs. Any savings in this part of Birch Creek might still be accomplished if measurements can show the water is actually being saved.

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The State Engineer does not believe that this exchange will injure any of the rights of Smithfield City. Their irrigation shares will be supplied at the injection point as stated above, and there are numerous other springs in Birch Canyon that might be captured by the city if they can appropriate them without injuring existing rights. Late-dated priority appropriations will not be feasible for municipal use, since they could only be used when Birch Creek is sufficiently dry that water would not otherwise reach the mouth of the canyon.

The State Engineer does believe, however, that Hyde Park City must honor prior stockwatering rights between Hyde Park Springs and Logan, Hyde Park and Smithfield Canal. During most years there are enough lower springs to supply existing stockwatering rights; however, if Birch Creek or the lower springs become sufficiently dry that there is not enough water for stockwatering, Hyde Park will have to supply enough water to honor the stockwatering rights by what ever means it chooses. Perhaps stock troughs and hydrants would be sufficient.

The State Engineer believes this exchange application can be approved; however, the applicant must comply with the following conditions:

1. They shall honor all stockwatering rights below Hyde Park Springs and above Logan, Hyde Park and Smithfield Canal.
2. They shall install a measuring device approved by the State Engineer at or near the point of injection into Summit Creek.
3. A continuous recording device will be installed and maintained on the measuring device to insure that at all times a proper exchange is being accomplished.
4. The overflow from Hyde Park's new reservoir, if any, will be discharged into the Logan, Hyde Park and Smithfield Canal to flow on through the exchange point and into Summit Creek so that the extra water diverted will not be lost to that hydrologic system.

The State Engineer suggests that Hyde Park City enter into an agreement with Smithfield City to maintain and operate the measuring device and recorder since Smithfield City's pending exchange application might be approved with the same conditions.

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The following formula will be used in determining what flow is to be injected into Summit Creek except at time when the Logan, Hyde Park and Smithfield Canal Company well is being pumped into Summit Creek to honor exchanges and its share holders:


Forty-six shares that Smithfield Irrigation Company owns in the upper canal plus 109 shares that Smithfield exchanges for culinary water, totaling 7.9% of the upper canal at all times will be delivered. If Smithfield City is letting the Smithfield Irrigation Company rent its excesses or "dry Lot" water, an additional 112 shares or 5.7% of the upper canal will be delivered. If the measuring device is up-canal from the Smithfield golf course or if Smithfield City is not irrigating the golf course or cemetery an additional 153.24 shares or 7.9% of the upper canal will be delivered; plus 55 shares of the 1180 shares that Hyde Park owns in the Logan Northfield Canal, or an additional 4.7% of the total divertable flow available to the Logan Northfield Irrigation Company will be delivered.

With these conditions clearly understood, the State Engineer believes that the exchange application can be approved.

It is, therefore, ORDERED, and Exchange application Number 1428 (25 Area) is hereby APPROVED, subject to prior rights and the conditions as stated above.

This decision is subject to the provisions of Section 73-3-14, Utah Code Annotated, 1953, which provides for plenary review by the filing of a civil action in the appropriate district court within sixty days from the date hereof.

Dated this 14th day of January, 1980.


Dee C. Hansen, State Engineer

DCH/RMT/pmh

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Mailed a copy of the foregoing Memorandum Decision this 14th day of January, 1980 to:

HYDE PARK CITY
Hyde Park
Utah 84318

Mr. Don Hansen
SMITHFIELD CITY CORP.
Smithfield, UT 84335

Mrs Don T. Meikle
SMITHFIELD NORTH BENCH COMPANY
239 North 2nd East
Smithfield, UT 84335

Mr. James L. Shupe
296 South 250 East
Hyde Park, UT 84318

Mr. Robert O. Cronquist
Smithfield Canyon
Smithfield, UT 84335

SMITHFIELD IRRIGATION COMPANY
76 West 400 South
Smithfield, UT 84335

Cache Valley Chinchilla Corp.
Box 66
Smithfield, UT 84335

Mr. Don T. Meikle
239 North 2nd East
Smithfield, UT 84335

Mr. Leo D. Perkes
LOGAN, HYDE PARK, SMITHFIELD
CANAL COMPANY
43 East First North
Hyde Park, UT 84318

By: 
Pearlene M. Harlfinger, Secretary

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AGREEMENT

WHEREAS on February 15, 1979 Hyde Park City filed its Application for the Right of Exchange of Water with the State Engineer of the State of Utah;

WHEREAS on January 14, 1980 the State Engineer granted this Exchange Application;

WHEREAS on or about March 10, 1980 Smithfield Irrigation Company, a Utah Corporation, filed its Complaint in District Court appealing the decision of the State Engineer;

WHEREAS the parties desire to amicably resolve their differences:

It is agreed:

1. Hyde Park City agrees to encourage the members of the Board of Directors of the Logan, Hyde Park and Smithfield Canal to take such action as will help stabilize and regulate the flow of water from the canal to where it is used by the Smithfield Irrigation Company and the State Engineer agrees to work cooperatively with the parties involved to also help stabilize and regulate the flow of water from the canal so that all parties receive their equitable share of water, particularly pursuant to the order granted January 14, 1980 by the State Engineer upon Hyde Park City's application for change. It is acknowledged that the State Engineer cannot and will not monitor this agreement on a regular or day to day basis.
2. Hyde Park agrees to work cooperatively with the State Engineer to ascertain and verify that the measuring device where water from Logan River enters the canal is operating correctly and that a fair exchange is being made and the parties agree under reasonable circumstances to request that the State Engineer inspect such device and monitor the fairness of the exchange.
3. Hyde Park agrees to install and maintain a measuring device approved by the State Engineer and Smithfield Irrigation Company, at or near the point of injection of the canal into Summit Creek to further insure a fair exchange, which approval cannot be unreasonably withheld.
4. Attached and incorporated into this Agreement is the statement and agreement of the Board of Directors and President of the Logan, Hyde Park and Smithfield Canal wherein they agree to carry the water which is subject of the exchange.
5. Whenever Hyde Park City is not using the 1.0 cfs of water from Birch Creek, (meaning the Hyde Park City reservoir is overflowing), all water overflowing from the upper Hyde Park City reservoir shall be diverted toward the Logan, Hyde Park and Smithfield Canal as part of the exchange, even if the overflow water is in excess of the amount of water in this exchange (1.0 cfs), and shall be delivered from the canal and by the Canal Company to the Smithfield Irrigation Company and its members and shareholders. It is acknowledged that the only overflow from the reservoirs occurs from the upper reservoir. To provide for circumstances where because of drought or other unusual circumstances the exchange cannot be met so that Smithfield Irrigation Company is entitled to all or part of its original right in Birch Creek, Hyde Park City agrees to install a meter, "T", and gate valve so that whatever portion of the exchange cannot be met, the water can be diverted from the Hyde Park City line into Birch Creek. These items will be installed in as convenient and accessible a location as possible in Birch Canyon based upon engineering recommendations.

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6. Hyde Park City agrees to provide and maintain appropriate measuring devices where the water is taken from Birch Creek so that Smithfield Irrigation Company can monitor the quantity taken.

7. In consideration of this Agreement and mutual promises of the parties, the pending appeal in District Court of the State Engineer's award of the exchange application shall be dismissed with prejudice; provided however, this Agreement and Dismissal of said lawsuit shall in no way affect Smithfield Irrigation's right to its water claims and/or shares and delivery thereof and also pursuant to the provisions of the order by the State Engineer's office, dated January 14, 1980 and shall all remain in effect and any action to aforesaid rights is not hereby affected.

8. This Agreement is subject to approval of the Hyde Park City water project by the appropriate government agencies, which Hyde Park City is seeking to obtain.

9. As and for the exchange of one second foot of water in this matter, Hyde Park City agrees and does tender and deliver to Smithfield Irrigation Company 55 shares of water stock in the Logan North Field Irrigation Company, the water represented by such shares to be delivered through the Logan Hyde Park, Smithfield Canal. Hyde Park City agrees to pay the water assessments on said shares of stock to the Logan North Field Irrigation Company on an annual basis and to keep the same current. Commencing in 1982, Hyde Park City agrees to pay the water assessments on the 25 shares of stock in the Logan Northern Irrigation Company referred to in that Agreement dated January 22, 1935 between Smithfield Irrigation Company and Hyde Park Town.

10. The State Engineer's Memorandum Decision dated January 14, 1980 is hereby incorporated by reference into this Agreement.

11. To simplify measurement and provide for monitoring that can be handled by any of the parties to this Agreement, the State Engineer's office agrees to provide a chart showing the percentage of flow and amount of flow which the Smithfield Irrigation Company should be receiving pursuant to this exchange so that they can easily monitor whether or not the exchange is being accomplished.

DATED this 24th day of November, 1981.

SMITHFIELD IRRIGATION COMPANY

ATTEST:

Renora H. Colburn
Secretary

By Dale J. Nilson
President

DATED this 24th day of November, 1981.

HYDE PARK CITY

ATTEST:

Alys Ann Ashcroft
Alys Ann Ashcroft,
City Recorder

By C. Bruce Hurren
C. Bruce Hurren, Mayor

Approved as to form and receipt of a copy acknowledged this
day of November, 1981.

Dee C. Hansen
Dee C. Hansen, State Engineer
Dallin W. Jensen
Dallin W. Jensen, Assistant
Attorney General, Attorneys for
State Engineer

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Miles P. Jensen
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56 West Center
P.O. Box 525
Logan, Utah 84321-0525
Telephone: 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

SMITHFIELD IRRIGATION CO.,
a Utah Corporation,

Plaintiff,

vs.

DEE C. HANSEN, Utah State
Engineer, and HYDE PARK CITY,
a Municipal Corporation,

Defendants.

ORDER OF DISMISSAL

Civil No. 18503

Based on the Stipulated Motion for Dismissal, the above-
captioned matter hereby is dismissed with prejudice.

DATED this 29 day of ^{January}~~December~~, 198⁸²~~7~~.

/s/ VeNoy Christoffersen
VeNoy Christoffersen
District Judge

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ATTORNEY GENERAL
STATE OF UTAH

Natural Resource Agencies
Suite 300
1636 West North Temple
Salt Lake City, Utah 84116
(801) 533-4446

- **DAVID L. WILKINSON**
ATTORNEY GENERAL
- **PAUL M. TINKER**
DEPUTY ATTORNEY GENERAL

M E M O R A N D U M

DATE: March 3, 1982

TO: ✓ Stan Green, Directing Appropriations Engineer
Michael Turnipseed, Northern Utah Area Engineer

FROM: Dallin W. Jensen, Assistant Attorney General

RE: Smithfield Irrigation Co. v. Dee C. Hansen, et al.,
Cache County Civil No. 18503

Attached is a copy of the Order dismissing the above-entitled action which has the effect of affirming the Decision of the State Engineer approving Exchange Application No. 1428. Part of this settlement included an Agreement between the parties relating to the collection of certain information and the distribution of water between the Smithfield Irrigation Company and Hyde Park City. A fully executed copy of that Agreement is attached hereto and should be attached to your file on this matter. I assume the Logan Area Office will carry out portions of the Agreement involving the State Engineer.

cc: Dee C. Hansen, State Engineer

Attachments

DWJ/jr

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